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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF AIRPORT COMMISSIONERS OF CITY OF LOS ANGELES,
Petitioner,

vs.

JEWS FOR JESUS, INC.,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer thereof. The brief is filed pursuant to Supreme Court Rule 36.4

INTEREST OF AMICUS

The City of St. Louis (Amicus City) owns and operates Lambert-St. Louis International Airport (Lambert), which is located in St. Louis County, Missouri. In response to lower federal court decisions in the mid-1970's declaring a First Amendment right of access to government airport terminals, the City of St. Louis

Airport Authority promulgated a "solicitation rule" which regulated expressive activities at Lambert, effective January 1, 1977. In November of that same year, the International Society For Krishna Consciousness of Missouri, Inc. (Krishna Society) filed a suit against Amicus City and St. Louis County in Missouri Circuit Court which challenged the constitutionality of the solicitation rule. The circuit court's judgment in that lawsuit declared much of the solicitation rule unconstitutional, and permanently enjoined Amicus City and St. Louis County from interfering with Krishna Society's religious activities at Lambert. *International Society For Krishna Consciousness of Missouri, Inc. v. City of St. Louis,* No. 70509-F (April 2, 1979). Amicus City officials therefore currently allow members of Krishna Society to proselytize and solicit contributions at Lambert.

On June 22, 1984, Trans World Airlines discharged Jesse Jamison from employment at its Lambert facilities. Jamison then sought permission from the Director of Lambert (the Director) to protest his discharge from TWA in a heavily trafficked portion of Lambert's main terminal. After his protest request was denied, Jamison filed suit against Amicus City and the Director in the United States District Court for the Eastern District of Missouri in March of 1985. That suit sought a declaration that the process by which the Lambert Director determined who may protest violated the First and Fourteenth Amendments and an injunction ordering Amicus City and the Director to permit Jamison to protest at Lambert.

After a trial on the merits, the District Court issued an order which declared that the method by which Amicus City and the Director determined protest requests was unconstitutional because it vested excessive discretion in the Director. *Jesse Woodson Jamison v. City of St. Louis,* No. 85-536C(5) (July 17, 1986). Although the order enjoined Amicus City and the Director from employing such a method to decide who may use Lambert for expressive activities, it denied Jamison's request for personal injunctive relief.

In a memorandum accompanying its order, the District Court concluded that Lambert was a public forum in which citizens were entitled to engage in First Amendment Activities. It then determined that the Director enjoyed unbridled discretion in determining protest requests in violation of the First and Fourteenth Amendments. The District Court went on to conclude, however, that the denial of Jamison's protest request constituted a reasonable time, place or manner restriction based on its finding that Jamison suffered from a serious mental impairment. The memorandum cited evidence that Jamison had a manic-depressive personality, suffered from radical mood swings, had access to a firearm, and had been indicted for the federal criminal offense of applying for a passport under a false name, but not prosecuted due to a dismissal of the charge by a federal District Court on the basis that Jamison could not appreciate the wrongfulness of the conduct alleged in the indictment.

On August 6, 1986, Jamison appealed to the United States Court of Appeals for the Eighth Circuit from that part of the District Court judgment that denied him personal injunctive relief. Amicus City and the Director cross-appealed on August 27 from that part of the District Court judgment that declared that Lambert is a public forum. The consolidated appeals are currently being briefed by the parties. *Jamison v. City of St. Louis,* Nos. 86-2007EM and 86-2249EM.

As the foregoing litigation history indicates, Amicus City has a profound material interest in the outcome of the instant case. A decision by this Court that government-owned airport terminals are not traditional public fora to which individuals and groups have a right of access for communication would enable Amicus City to enforce a uniform ban on First Amendment activities within the confines of the Lambert terminal. Amicus City believes that such a ruling is not only warranted under established First Amendment law, it is necessary to enable government officials to operate airport terminals safely and efficiently for the benefit of the traveling public.

SUMMARY OF ARGUMENT

This Court determines whether the First Amendment requires government to allow expressive conduct on its property by focusing on the nature of the particular piece of property in question. If the property has a historical association with assembly and debate, or if government officials have intentionally allowed the public to use the property for discourse, then the property constitutes a public forum. Conversely, if neither of those descriptions apply to the particular property, then it is a nonpublic forum. Government may completely ban expressive conduct in nonpublic fora.

The court of appeals' decision in this case holding that the interior of Los Angeles International Airport is a public forum conflicts with precedent of this Court, and is based on a misplaced and incorrect analysis that focuses on the dubious physical resemblance between airport terminals and recognized public fora. Government officials have kept the terminal at Los Angeles International Airport closed to expressive conduct, and terminals lack a significant traditional association with public discourse.

Moreover, the court of appeals' decision ignores the maxim that the government is free to preserve its property for its intended purposes. An affirmance of that decision by this Court would frustrate fulfillment of an airport terminal's predominant purpose, which is to safely and efficiently serve the needs of the traveling public. The public would then have a broad right of access to airport terminals to express views on practically any subject, which would inevitably cause increased congestion and a greater risk of violence in those terminals.

ARGUMENT

This case presents the question whether government officials may uniformly prohibit all individuals and groups from engaging in expressive activity, such as proselytizing, demonstrating, protesting and soliciting contributions, within the confines of a publicly owned airport terminal. Analysis of this question must begin with the premise, which this Court restated just last year, that the government enjoys the same prerogative as the private property owner "to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ____, 87 L.Ed.2d 567, 578 (1985) (quoting *Greer v. Spock*, 385 U.S. 39, 47 (1966)).

This Court has frequently wrestled with the difficult issue of when the First Amendment compels the government to allow expressive activity on its property. See, e.g., *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra; United States v. Grace*, 461 U.S. 171 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Hague v. CIO*, 307 U.S. 496 (1939). Out of this welter of cases involving myriad factual contexts, this Court fashioned a mode of analysis for resolving conflicts between governmental efforts to reserve public properties for uses consistent with the purposes and functions of those properties and attempts by individuals and groups to use those properties as platforms for disseminating and exchanging ideas. This mode of analysis focuses on the nature of the particular property at issue. Thus, the analytical process of resolving a question regarding the right of access to engage in expressive conduct on a particular piece of government property begins with the characterization of that property. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra*, 87 L.Ed.2d at 578; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 44.

Public property falls into one of three categories for First Amendment purposes. *Cornelius v. NAACP Legal Education and Defense Fund, Inc., supra,* 87 L.Ed. at 579-80; *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. at 45-46. Streets, sidewalks, parks and other similar places which have an historical association with the exercise of free speech rights comprise the first category, and are denominated traditional public fora. See *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* 87 L.Ed.2d at 580. With respect to such places, the First Amendment sets narrow limits on the government's discretion to prohibit or regulate expressive activity. *United States v. Grace,* 461 U.S. at 177.

All other government property falls into one of the two other categories. The second category consists of those public properties that lack the historical association with assembly and debate that defines traditional public fora, but which the government has intentionally opened to expressive conduct. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 580; *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. at 45. Such "limited" public fora, see, e.g., *Perry Educ. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 48, are governed by the same standards concerning time, place and manner restrictions and content-based exclusions that apply to traditional public fora. *Id.* at 45-46. Government officials need not indefinitely maintain the open character of limited public fora, however, as they retain their prerogative to prohibit the public, once again, from using such facilities for free speech purposes. *Id.* at 46.[1]

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[1] Logically, the First Amendment would prohibit government fficials from unreasonably closing a limited public forum to expressive activity to, for example, suppress a particular viewpoint. Cf. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 582, 584 (the government may control access to public property that is not a traditional or limited public forum so long as the restrictions are reasonable and viewpoint neutral).

The last category is, by definition, a residuary class, as it consists of "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* Thus, a "nonpublic" forum is any government property which is not of a type historically associated with assembly and debate and which has not been opened to expressive conduct. *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* 87 L.Ed.2d at 582. The government may prohibit expressive activity altogether in such nonpublic fora. *Id.* at 591 (Blackmun, J. dissenting). See also, *Perry Ea. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 46.

The court of appeals in the instant case decided that the terminal interior of the Los Angeles International Airport is a traditional public forum and ruled unconstitutional a resolution of the Board of Airport Commissioners of the City of Los Angeles closing that area to First Amendment conduct.[2] In so ruling, the court of appeals principally relied on previous decisions of several circuits of the United States Courts of Appeals which generally stress the superficial structural similarity between terminal interiors and public thoroughfares. See *United States Southwest Afica/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760, 764 (D.C.Cir. 1983); *Fernandes v. Limmer,* 663 F.2d 619, 627 (5th Cir. 1981); *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921, 925 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975). These decisions improperly turn the determination whether an airport terminal is a traditional public forum on the mere physical composition of terminal interiors, citing a debatable resemblance between public streets and terminal common areas, concourses,

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[2] Because a limited public forum comes into existence only when the government intentionally opens a nonpublic forum to expressive conduct, *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 580, any contention that the terminal in question in this case is a limited public forum is meritless in view of the Board of Airport Commissioners' resolution banning all First Amendment activity in the terminal.

restaurants and shops. This Court's decisions in the field of forum analysis not only belie the propriety of such an approach, but strongly suggest that a terminal of a major metropolitan airport is not a public forum.

In *Widmar v. Vincent, supra,* this Court held that a state university converts its campus into a limited public forum by allowing student groups to use its facilities for meetings. By virtue of the definition of a limited public forum, a necessary concomitant of that holding is that a state university is a nonpublic forum absent official acquiescence in the use of its facilities for First Amendment communicative purposes.[3] The court of appeals' conclusion in the instant case that an airport terminal is a traditional public forum is, therefore, consistent with *Widmar* only if an airport terminal has a greater historical association with assembly and debate than a state university. That this is not so hardly requires stating. Institutes of higher education have a long and rich history as fertile arenas for intellectual exchange and cultural intercourse, see, e.g., *Healy v. James,* 408 U.S. 169, 180-81 (1972), that airports certainly lack. The court of appeals' characterization of the terminal at Los Angeles International Airport as a traditional public forum is irreconcilable with *Widmar* and requires a reversal of its decision.

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[3] In *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* this Court defined a limited public forum as a nonpublic forum which the government has intentionally opened to public discourse. 87 L.Ed.2d at 580. See also, *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* 460 U.S. at 45-46 (limited public forum is government property "opened for use by the public as a place for expressive activity"). Indeed, this Court employed the same reasoning in support of its conclusion in *Greer v. Spock, supra,* that a military reservation is a nonpublic forum so long as the responsible authorities do not abandon their interest in regulating communicative activities within its confines. 424 U.S. at 838 (distinguishing *Flower v. United States,* 407 U.S. 197 (1972), as standing for the proposition that governmental authorities may convert a military reservation into a public forum by acquiescing in general expressive conduct).

An affirmance of the Court of Appeals' decision in this case would not only conflict with the logical import of *Widmar,* it would also empty of any practical significance the principle that the government has the same power as the private property owner to deny uses of its property that would be inconsistent with the purpose to which it dedicated the property, *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 578. The purpose of a major metropolitan airport terminal is to provide a safe, secure, efficient and pleasant nexus for the linkage of air and ground forms of transportation. The mere fact that an airport's officials allow the public to use a terminal's facilities that are only incidentally related to the terminal's principal purpose, such as restaurants, shops, and arcades, does not mean that an airport terminal is a public forum. See *United States v. Grace, supra,* 461 U.S. at 177 (public property is not a public forum merely because members of the public are freely admitted).[4] When the government owns or operates an airport terminal, it is engaged in a commercial venture, the overarching purpose of which is to serve the traveling public. See *Lehman v. City of Shaker Heights,* 418 U.S. 298, 303 (1974) (city bus advertising spaces not a public forum since commercial use of the property inconsistent with public forum status).

In analyzing whether a particular piece of property is a public forum, this Court has looked to whether expressive activity would be consistent with the principal purpose of the property. See, e.g., *Cornelius v. NAACP Legal Defense & Educational*

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[4] In *Chicago Area Military Project v. City of Chicago, supra,* 508 F.2d at 925, upon which the court of appeals heavily relied in this case, the Seventh Circuit reasoned that "great numbers of people [visit] terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity." Not only would this be undeterminative of the question whether an airport terminal is a traditional public forum, the court's conclusion that great numbers of people flock to airport terminals for purposes unrelated to travel is questionable.

Fund, Inc., supra, 87 L.Ed.2d at 581-82 (federal work place exists to conduct business and is a nonpublic forum); *Greer v. Spock, supra,* 424 U.S. at 837-38 (purpose of military reservation is to train soldiers and it is not a public forum).

If this Court were to hold that an airport is a public forum, it would impair the ability of government officials to ensure fulfillment of an airport terminal's principal purpose of efficiently and safely serving the traveling public. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 582 (government enjoys right to restrict access to federal workplace to avoid interruptions). Just as the government must enjoy wide latitude in managing the federal workplace, *id.*, the government must have considerable discretion in managing heavily trafficked and congested airport terminals. Characterization of an airport terminal as a traditional public forum would compel government officials to permit expressive conduct by any and all persons and would impose extremely stringent standards on content-based exclusions. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 45. Airport officials would then be hard-pressed to justify rules prohibiting expression on potentially inflammatory topics. Any individual would be free to use an airport terminal to express his or her viewpoint on, for example, relations between the United States and Libya, or the morality of abortion, unless government officials were confident they could demonstrate that the exclusion of expression on that topic was based on a compelling state interest and was narrowly drawn to achieve that end. *Id.* Viewpoint expression on such emotionally charged and divisive issues would carry a high potential for disruption of the orderly flow of travellers within the crowded confines of an airport terminal, since those passersby who hold contrary viewpoints might seize the opportunity to engage in actual debate, thus further congesting terminal concourses and corridors. It is also common knowledge that airports provide appealing and susceptible targets for terrorists, and the addition of viewpoint expression on inflammatory political topics would

increase the possibility of violence at airport terminals. Those demonstrators themselves could become the focus of terrorists atrocities, thereby endangering innocent bystanders as well.

It is no answer that these concerns are instead relevant to the determination of reasonable time, place and manner restrictions. That these concerns are particularly acute in the airport terminal context demonstrates the inherent incompatibility between expressive conduct and the legitimate business to which airport terminals are dedicated. A pronouncement by this Court that terminals of major metropolitan airports are not public fora would not deprive the public of any right. A speaker does not enjoy a First Amendment right of access to a particular piece of government property merely because it provides the best situs for delivery of the speaker's message. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 87 L.Ed.2d at 584. Furthermore, the availability of alternative channels of communication, such as streets, sidewalks, and parks, ensures that the speaker is able to reach the same audience that patronizes airport terminals. *Id.* In short, characterization of government airport terminals as nonpublic fora would have only an insignificant impact on the public's overall ability to engage in expressive activities, but it would greatly enhance the ability of government officials to operate those terminals in a safe, secure, efficient and pleasant manner for the benefit of the traveling public.

CONCLUSION

The instant case presents this Court with the opportunity to give practical meaning to the principle that the government, no less than the private citizen, enjoys the prerogative to preserve its property for its intended use. The foregoing authorities and forceful policy arguments demonstrate that the interiors of government owned or operated airport terminals are not traditional public fora. It follows that the resolution of the Board of Airport Commissioners of the City of Los Angeles was a reasonable and constitutional exercise of its power to preserve the terminal interior of Los Angeles International Airport for its lawfully dedicated purpose of serving the traveling public. Wherefore, this Court should reverse the judgment of the court of appeals in this case.

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